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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

BARBARA SELLARS, ADMINISTRATRIX OF THE ESTATE OF JAMES WALTER SELLARS, DECEASED, PETITIONER

V.

LOGAN TOWING COMPANY, INC., A MISSISSIPPI CORPORATION, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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46 U.S.C. §688

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BARBARA SELLARS, ADMINISTRATRIX OF THE ESTATE OF JAMES WALTER SELLARS, DECEASED, PETITIONER

V.

LOGAN TOWING COMPANY, INC., A MISSISSIPPI CORPORATION, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE EIGHTH CIRCUIT

The Petitioner, Barbara Sellars, Administratrix of the Estate of James Walter Sellars, deceased, prays that a Writ of Certiorari issue to review the final judgment of the United States District Court, District of Minnesota, Third Division, rendered on February 21, 1968 and the judgment of the United States Court of Appeals for the Eighth Circuit rendered on August 1, 1969.

OPINION BELOW

The opiinon of the United States Court of Appeals for the Eighth Circuit, as yet unreported, appears at Appendix A, infra, pp.

JURISDICTION

The order or judgment of the United States Court of Appeals for the Fourth Circuit was entered on August 1, 1969. See Appendix A, infra. An extension of time for filing Petition for Certiorari was sought and obtained. This Petition for Certiorari is being filed within the period of time granted by said extension. The jurisdiction of this court is invoked under 28 U.S.C., §1254 (1).

QUESTIONS PRESENTED

1. Whether Respondent's failure to provide adequate assistance in the form of fellow crew members for the particular task in which the deceased seaman involved was engaged at the time of his death (and which caused his death) constituted negligence under the Jones Act, separate and apart from the question of the seaworthiness *vel non of* Respondent's vessel, the M/V HILLMAN LOGAN.

2. Can the deceased seaman's wife and minor daughter recover for negligence under the Jones Act — separate and apart from the Doctrine of Unseaworthiness — for the vessel owner's failure to provide adequate assistance in the form of fellow crew members for the particular task in which the decedent was engaged at the time of his death?

3. Whether Respondent's failure to require the use of any or proper individual safety equipment, such as life jackets, constituted negligence under the Jones Act, separate and apart from any question of the unseaworthiness *vel non* of the M/V HILLMAN LOGAN, Respondent's vessel.

4. Can the deceased seaman's wife and minor daughter recover for negligence under the Jones Act — separate and apart from the Doctrine of Unseaworthiness — for the vessel owner's failure to make sure that its crew members wore life jackets while working with coiled steel cable having a tendency to lurch or jerk when handled in close proximity to the vessel's edge?

STATUTORY PROVISION INVOLVED

46 U.S.C. §688 provides:

> "Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes

of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located."

STATEMENT OF FACTS

On May 2, 1966, four seamen were dispatched to the bow of the M/V HILLMAN LOGAN for the purpose of attaching this boat to a barge. While engaged in this operation, one of the seamen, namely James Walter Sellars, was caused to fall overboard into the waters of the Mississippi River. Said river, at this time, was at flood stage, the current was extremely swift, and said seaman, after so falling, met his death by drowning.

The crew members participating in such an attaching operation aboard this boat were required to manually handle lengths of steel cable in the immediate area adjacent to the edge or outermost extremity of the M/V HILLMAN LOGAN. These steel cables are affixed in the following manner: One end of this cable is attached to a permanent fixture on the boat, called a button, while the opposite end of the same length of cable is attached to a wench aboard the boat. A length of slack line between these two objects was then permitted to form a loop which was utilized in attaching the boat to the barges it towed. When this loop or length of slack line was not actually being used in the attaching operation, it, rather than being wound up upon the wench involved, was stored by hanging it over a hook which, like the two ends of the cable, was likewise situated on the boat. As stated, the storage hook involved was placed very close to the edge of the boat and a removal of cable from it would necessarily take place in a precarious place.

Also, when this loop or length of slack line was removed from its customary storage hook, due to the manner of its storage, it on occasion and without warning had a tendency to jerk or lurch, a characteristic known the owners of the M/V HILLMAN LOGAN.

If a single seaman — as distinguished from two or more seamen — were to remove this cable from this hook and this jerk or lurch were to occur, such action on the part of this coiled line could be (and was in this case) sufficient to cause

the seaman involved to lose his balance and thereby fall overboard. If, on the other hand, said cable were handled by two or more seamen, the effect or the severity of said jerk would be minimal and such loss of balance would not occur.

As previously stated, four men were initially dispatched to attach the M/V HILLMAN LOGAN to the barge involved, but in an effort to expidite this attaching — with an utter disregard of the hazards present — James Walter Sellars, alone, was directed to remove said cable from its storage hook. Immediately upon so removing this line, the aforedescribed jerk or lurch occurred and Sellars disappeared, lost his life, and the loose line dangled helplessly overboard.

Furthermore, as operations of this type must necessarily take place in close proximity to the boat's edge, company policy required that participating crew members at all times wear life jackets. The ship's officers, specifically the mate and the captain, were designated to see that such a safety rule was, in fact, implemented. Such a policy nowithstanding, however, this boat's officers made no effort to see that at the particular time involved said crew members wore their life jackets. These officers simply paid no attention to the attire of the crew as they participated in the above described activities aboard this boat. As the mate aboard the boat is candid to admit (after conceding that it is his duty to see that life jackets are worn by the crew) he simply did not notice whether James Walter Sellars had on a life jacket immediately prior to his falling overboard. It is these failures, namely the failure to enforce the life jacket policy of the company and the failure to see that the decedent was afforded adequate assistance in the way of fellow crew members that prompt this petition.

REASONS THE WRIT SHOULD BE GRANTED

1.

THE WRIT SHOULD BE GRANTED BECAUSE IMPORTANT QUESTIONS OF FEDERAL MARITIME LAW NOT PREVIOUSLY DECIDED BY THIS COURT ARE HERE INVOLVED

As has previously been stated, this is an action brought by Administratrix of the estate of a deceased seaman. As a

claim for unseaworthiness of a vessel would not survive to the survivors of James Sellars, *Gillespie v. U. S. Steel Corporation*, 379 U. S. 148, 85 S. P. Ct. 305, 13 L. Ed. 2d 199, this claim finds its substantive basis in the Jones Act, which affords this widow and her minor child their exclusive remedy.

As stated, this claim is based factually upon the ship owner's failure to enforce its rule requiring the use of life jackets and its failure to afford the decedent adequate assistance for the particular task being performed at the time involved. It is without question that a claim based on unseaworthiness (were this not a death case) could be maintained for the ship owner's failure to afford adequate assistance. This question was put to rest in *Waldron v. Moore-McCormack Lines, Inc.*, 386 U. S. 724 (1967) where the court expressly held that the doctrine of unseaworthiness was applicable to this situation. See also *American President Lines, Ltd, v. Redfern*, 345 F.2d 629 (9th Cir. 1965); *June T., Inc. v. King*, 290 F. 2d 404 (5th Cir. 1961). It is also clear that an action bottomed on unseaworthiness could be maintained for the failure to require the use of the appropriate safety equipment. The important question of Federal Maritime Law, therefore, is whether or not these particular ommissions are also acts of negligence within the purview of the Jones Act.

2.

THE DECISION BELOW DIRECTLY CONFLICTS WITH THE PRINCIPLES ANNOUNCED BY THE FIFTH CIRCUIT COURT OF APPEALS IN *DAVIS v. PARKHILL — GOODLOW COMPANY*, 302 F.2d 489 (5th Ct. 1962), AS WELL AS SETTLED PRINCIPLES OF FEDERAL MARITIME LAW

In *Davis*, like in the present case, life jackets were available to seamen working in the close proximity with the vessel's edge, but said seamen were not required by the ship's owner to wear said life jackets. The seaman in *Davis* fell overboard and drowned and an action under the Jones Act was commenced for his death. The lower court entered judgment for the ship owner, an action reversed by the Court of Appeals for the Fifth Circuit.

The Court of Appeals concluded as a *matter of law* that the shipowner could not absolve itself of the obligation to exercise prudent care for the safety of seamen by leaving the important

decision, i.e., to wear or not to wear a life vest, up to the seaman himself.

The practice of leaving such a decision to the seaman was condemned by the court and deemed negligent as a matter of law. The court said:

> "...such a practice was to fly in the face of accumulated experience of mankind in the struggle against the hazards of the cruel sea. (citing cases). Moreover, it ignored this shipowner's affirmation that this nautical wisdom required, at the very minimum, a stringent mandate to use life vests and *an adequate program of enforcement to secure compliance.*" At page 492-492.

The Court further said:

> "This is but the application of the familiar principle of salt water, amphibious and landlocked jurisprudence that there is a *duty to warn in an effective way of dangers* not reasonably known *** *and a duty to take effective action in* the light of the particular condition...."

The particular condition involved in *Davis,* which imposed an affirmative duty as a matter of law upon the ship owner to enforce its rule requiring seamen to wear life jackets was the inexperience of the particular seaman who there met his death. In this case, the particular condition which likewise, as a matter of law, imposes a duty on the present ship owner to enforce its life jacket rule was the unusually hazardous task being performed by the decedent.

Under these conditions, the ship owner obviously, admittedly and negligently failed in his duty to have "adequate program of enforcement to secure compliance" with its rule requiring the wearing of life jackets. In fact, it is apparent that said ship owner had virtually no program of enforcement whatsoever.

Other cases imposing liability under the Jones Act upon a ship owner for its failure in meaningfully affording appropriate safety devices include the Mangore 1 F. Supp, 138 (D.C. 1932) (goggles.) *Darlington v. National Bulk Carrier, Inc.* 147 F.2d 817 (2 Cir. 1946) (face mask) *Grantham v. Quinn,* 344 F.2d 590 (4 Cir.); *Reagen v. Sinclair Refining Company,* 319 F.2d 363 (5 Cir.) guardrail.

THE DECISION BELOW DIRECTLY CONFLICTS WITH SEVERAL PRINCIPLES OF FEDERAL MARITIME LAW IMPOSING LIABILITY ON A SHIP OWNER FOR FAILURE TO PROVIDE ADEQUATE ASSISTANCE IN THE FORM OF FELLOW CREW MEMBERS FOR A PARTICULAR TASK

It has been held in numerous cases, apart from any consideration of unseaworthiness, that a ship owner's failure to provide adequate assistance in the form of fellow crew members for a particular task constitutes negligence, imposing liability under the Jones Act or under the General Maritime Law. For example, in *Romero v. Garcia & Diaz, Inc.*, 286 F.2d 347 (2 Cir. 1961) the plaintiff was injured while attempting to lower a boom which, due to a kink in the cable, he was unable to control, catching him in its turns. The court in this case concluded that in the event the crew assigned was inadequate that this would establish negligence under the Jones Act, separate and apart from the question of unseaworthiness.

Also, in the *Magdapur*, 3 F. Supp. 971 (D.C. N.Y. 1933) the plaintiff brought an action for personal injuries, alleging that he was required to take in a heavy mooring line without adequate assistance. The court held that the failure of plaintiff's superiors to provide adequate men to perform this task would constitute negligence under the Jones Act imposing liability on the vessel's owner.

Additionally, in *Gold v. Groves*, 182 F.2d 767 (3 Cir. 1950) a seaman brought a Jones Act action for injuries resulting from his having to load meat without adequate assistance. A verdict was directed for the defendant in the lower court, an action which, on appeal, was reversed. In so reversing the court expressly recognized the rule that failure to supply sufficient help is a ground of negligence under the Jones Act, separate and apart from any question of the unseaworthiness of the vessel involved.

Thus, in this case we urge that the ship owner's failure here constitutes negligence under the Jones Act.

4.

THE DECISION BELOW DIRECTLY CONFLICTS WITH A MULTITUDE OF THE DECISIONS OF THIS COURT HOLDING THAT A SEAMAN IS THE WARD OF THE ADMIRALTY WHOSE RIGHTS AND INTERESTS SHOULD BE SCRUPULOUSLY PROTECTED

Seamen have long been classified as persons to whom the courts owe an unusually heavy burden of protecting their rights. It has been recognized, in a number of cases, that such men need the protection of the admiralty court. As Justice Story aptly put it:

> "Every court should watch with jealousy an encroachment upon the rights of seamen...[C]ourts of maritime law have been in a consistent habit of extending toward them a peculiar, protecting favor in guardianship. They are emphatically the wards of the admiralty...they are considered as blessed over the dominion and influence of men, who have naturally acquired a mastery over them..." *Harden v. Gordon,* 11 Fed. Cas. 480 (No. 6047) (C.C.Me. 1823); *Garrett v. Moore-McCormack Company,* 317 U.S. 239 (1942). It has also been stated:

> "Seamen are a class of persons remarkable for their rashness, thoughtlessness and improvidence...courts of admiralty...are accustomed to consider seamen as peculiarly entitled to their protection; so that they have been, by a somewhat bold figure, often said to be favorites of courts of admiralty." *Brown v. Lull,* 4 Fed. Cas. 407 (No. 2018) (C.C. Mass. 1836).

As this court is under a duty to scrupulously protect the rights of the deceased seaman here, its review here on certiorari very nearly approaches that exercise by that Circuit Court of Appeals. Its review on certiorari, therefore, extends to the jury's finding of fact as well as to ruling as to question of law. *Panama Mail S.S. Company v. Gargas,* 281 U.S. 670 (1930).

CONCLUSION

To protect the integrity of this court's numerous pronouncements as to the protection that the interest of a seaman should be afforded, as well as to resolve the conflict between this decision and that of the Fifth Circuit Court of Appeals as well as other circuits, and to determine the very serious questions of federal maritime law here involved, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Appendix A.

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 19,294

Barbara Sellars, Administratrix of the Estate of James Walter Sellars, Deceased, Appellant, v. Logan Towing Company, Inc., Appellee.	Appeal from the United States District Court for the District of Minnesota.

[August 1, 1969.]

Before BLACKMUN, MEHAFFY and HEANEY, Circuit Judges.

MEHAFFY, Circuit Judge.

This suit was brought by the plaintiff, Barbara Sellars, as Administratrix of the estate of James Walter Sellars, deceased, under the Jones Act, 46 U.S.C.A. 688, and the General Maritime Law for damages accruing to the survivors of James Walter Sellars who, while engaged in his duties as a deckhand aboard the M/V HILMAN LOGAN, a towing vessel owned and operated by defendant, Logan Towing Company, Inc., lost his life by drowning. The case was tried to a jury resulting in a verdict and judgment for defendant.

The assignments of error upon appeal relate to the trial court's instructions and the admission of certain evidence. We affirm the judgment.

Briefly summarized, the accident occurred during the course of a "facing up" operation of the towboat M/V HILMAN LOGAN and a total of eight barges moored to the bank of the Mississippi River near St. Paul, Minnesota. "Facing up" means the securing of the towboat to the stern barge in a tow. In this instance, the stern barge of the tow was Barge J-10. This operation was done by means of four steel cables, each leading from a winch on the forward deck of the towboat to a timberhead or bitt on the back of the stern barge and then back to a button or fastening on the bow of the towboat. At the time of the accident, the HILMAN LOGAN was positioned near the bank with her bow flush with the stern of Barge J-10. The towboat and barges were stationary and secured to the bank.

Sellars, the decedent, and Willie Fivecoat, another deckhand, were in charge of attaching the cables on the starboard side. Decedent was on the starboard stern of Barge J-10 and Fivecoat on the starboard bow of the towboat. Two other deckhands were attending to similar duties on the port side. Fivecoat was laying out slack from the starboard manual winch, and when he looked up he saw decedent pick up the end of the cable with both hands from a hook on the side of the tow knee, lose his balance and fall overboard. Fivecoat was the only eyewitness and according to his testimony decedent only surfaced once about a foot from the barge before submerging again and instantly being swept by the swift current under the barge of the tow before any assistance could be given. This all occurred within a matter of seconds and decedent, although an experienced deckhand, had failed to wear his life jacket in disregard of the posted rules aboard the HILMAN LOGAN.

Plaintiff alleged negligence on the part of defendant in not providing sufficient men to safely perform the facing up operation, by not enforcing the rule requiring the wearing of a life jacket, and in not having an established man overboard procedure. Defendant denied any guilt of negligence on its part and pleaded contributory negligence

on the part of decedent. Defendant's contention was that decedent was negligent inasmuch as he performed the job in an unsafe manner because he did not wait for help when lifting the wire from the low knee, or, if he intended to complete the job alone, he failed to hold onto the tow knee with one hand and handle the cable with the other.

Plaintiff first contends that the court, by its instructions, erred in such a way as to afford defendant additional defenses contrary to defendant's position and without support in the record. The specific language included in the court's charge and objected to as affording additional defenses contrary to defendant's position without record support is as follows:

> "I gather from the evidence and from the argument of the defendant that the principal urging of the defendant in support of his claim of contributory negligence by the deceased is not that he did not wear a life jacket, but that he should have waited for a fellow worker to assist him in this job he was doing, or if he was going to do it himself, he should have held onto some superstructure of the vessel as the defendant claims was the customary practice in the industry."

We find this argument without merit because it was defendant's contention throughout that decedent was negligent in taking the cable off the hook on the tow knee without using one hand to brace himself on the tow knee and the other hand to lift the wire off the hook, or, if assistance was desired, to wait until the other deckhand had completed laying out the cable and could assist. Counsel for defendant made this position clear in his opening statement:

> "Now, the defendant's proof in this case is a fairly simple, factual presentation. We intend to prove that the manner, the proper manner in which to take this wire off the hook on the towing knee was to use the towing knee as a brace, take one hand and secure yourself, and to use the other hand to lift the wire off the hook so as to avoid permitting yourself to fall off balance. If that precaution is not to be taken our evidence will show that you had to have someone to help you. It was possible to do it by yourself, but to do it you had to take that precaution. That basically is

what we intend to show was the mistake that the plaintiff made, the decedent made, and cost him his life.

"There was only one eyewitness to this accident, and you haven't heard his testimony yet, and that is Mr. Fivecoat's who was working with the decedent just prior to his death. We will show that what the decedent did was come up to the wire and reach up with two hands, reaching around the side of the towboat and that he then, as he lifted the wire off the hook, lost his balance, dropped the wire into the water, waved his hands a few times in an attempt to catch his balance and fell feet first into the water."

We note that the particular language of the court's instructions amounted to nothing more than an explanation of defendant's theory of the case as outlined by counsel in his opening statement. Further, in counsel's closing argument he reminded the jury of Mr. Fivecoat's testimony that as he raised up from handling the lines on the side of the boat it was his intention to render whatever assistance was necessary to decedent in lifting the wire but that decedent did not choose to wait for help but lifted the wire by himself and in such a fashion as caused him to lose his balance and thus lose his life. Counsel added in his closing argument, "I submit to you that this is the sole cause of Mr. Sellars' death." The court's statement in the charge was not only proper but it was not in any sense a binding instruction and amounted to a mere paraphrasing of defendant's theory of the case. There was substantial evidence to support this theory and defendant, of course, was entitled to instructions on any theory of the case that has support in the evidence. This court said in *Megarry Brothers, Inc. v. United States,* 404 F.2d 479, 489 (8th Cir. 1968): "A party is entitled to have proper requested instructions on his theory of the case if there is evidence to support it."

The above rule is fundamental and certainly no prejudice could have resulted from the trial court's statement.

Plaintiff also argues that the court's instruction on the emergency doctrine was erroneous. The allegedly objectionable part of the court's charge is the first paragraph quoted below:

"In connection with an emergency such as was occasioned here, I should advise you that in the circumstance of a sudden and unexpected occurrence, the standard of reasonableness or care is not the same as in ordinary circumstances, and so if you should find that the crew of this vessel, the Hillman [sic] Logan, were confronted with a sudden emergency when James Sellars was in the water, you should measure their conduct in the light of the circumstances and what seemed reasonable for the members of that crew to do at the time.

"Of course, as the operator of a vessel, this defendant had certain duties. It was his continuing duty, the owner of this towing company, as an employer, to use ordinary care under the circumstances in furnishing the plaintiff with a reasonably safe place in which to work, to use ordinary care under the circumstances to maintain and keep such place of work in a reasonably safe condition, to provide adequate life saving gear, and to promulgate and enforce regulations for its crews and for the rescue of seamen imperiled and to provide an adequate crew available for the discharge of the crewmen's responsibilities."

The sole objection advanced to this instruction is that the defense of sudden emergency is not available to one whose own negligence contributed to bringing it about. But here the jury found defendant free of negligence; otherwise it could not have returned the verdict it did. No prejudice could have resulted requiring a reversal even if the instruction had been a misstatement of the law. This court said in *Lowe v. Taylor Steel Products Co.*, 373 F.2d 65, 68 (8th Cir. 1967), *cert. denied*, 389 U.S. 858 (1967):

"Assuming *arguendo* that the court had erroneously instructed on comparative negligence, it would not have been prejudicial in this case because the jury specifically found that the defendants were guiltless in every particular of negligence charged. We find no error in the court's instruction on the law of comparative negligence but even if there had been and proper objection made thereto, we as a reviewing court would consider it harmless. It could not have affected the verdict as the rule of comparative negligence could not come into play without a finding that

both parties were guilty of negligence. Since the defendants were found free of such guilt, the harmless error rule would apply. This rule applies to instructions as well as other alleged errors. Judge Van Oosterhout of this court said in *Minnesota Mut. Life Ins. Co. v. Wright*, 312 F.2d 655, 661 (8th Cir. 1963):
" 'Rule 61, Fed. R. Civ. P., like Rule 52 (a), Fed. R. Crim. P., provides that errors which do not affect the substantial rights of the parties shall be disregarded. 28 U.S.C.A. §2111 provides that upon appeal, harmless errors shall be disregarded. The harmless error rule applies to instructions. See Moore, Federal Procedure, para. 61.09.' "

The same principle applies here.

Plaintiff also complains of the lack of instruction on the weight to be given evidence of custom, but we find from a canvass of the instructions as a whole that the court fully, fairly and properly instructed the jury and in every respect afforded plaintiff a fair trial. The jury simply concluded that the unfortunate death of decedent was not in any manner the result of any negligence on the part of defendant for which liability attaches.

Finally, it is argued that the court erred in permitting defendant's employees to testify as to the method they had used in the "facing up" operation. Plaintiff introduced an expert witness in an effort to show that decedent should have had help in doing this assignment as he could not safely perform it alone. This witness testifies that a deckhand could not hold onto the tow knee with one hand and lift the end of the cable from the hook with the other because the tow knee was too large. In order to contradict this testimony, defendant produced two of decedent's coworkers on the HILMAN LOGAN who regularly performed "facing up" work. These witnesses testified that the job could be safely done by one man if he would hold onto the tow knee with one hand and lift the cable from the hook with the other. Both witnesses testified that the tow knee on this particular boat was not too large to hold onto. They further testified that the deckhand working on the deck of the tug would usually help the deckhand on the barge take the cable off the hook on the tow knee, and this is exactly what Fivecoat testified he contemplated

doing had decedent only waited until he had finished laying out the cable rather than electing to perform the task unassisted. Certainly, the testimony as to the ability to hold onto the tow knee and perform the work unassisted was proper evidence admitted in rebuttal to plaintiff's expert testimony. Who would know better the size of the tow knee on the HILMAN LOGAN than the men who actually performed the work on this towboat? If such evidence was improper (and we do not think it was), it would have been admissible in the instant case under the doctrine of verbal completeness as plaintiff's expert first brought up the subject. *Kayser v. United States,* 394 F2d. 601, 606 (8th Cir. 1968), *cert. denied,* 393 U.S. 919 (1968); *Babb v. United States,* 351 F.2d 863, 866-867 (8th Cir. 1965); *Newman v. United States,* 331 F.2d 968, 970-971 (8th Cir. 1964), *cert. denied,* 379 U.S. 975 (1965); *Smith v. United States,* 224 F.2d 58, 60-61 (5th Cir. 1955), *cert, denied,* 350 U.S. 885 (1955). To have rejected such evidence in the context of this case would have had a misleading effect on the jury and would have been highly improper.

We are convinced that the plaintiff was afforded a fair trial completely free of any prejudicial error and that substantial evidence supports the jury verdict. The judgment is affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

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Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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MAY IT PLEASE THE COURT:

The petition treats this case as though it were a non-jury matter. Quite the contrary, the petitioner sought and obtained a jury trial about which the Trial Judge, the Honorable Edward J. Devitt, commented:

> "It was a routine fact issue presented to the jury and decided, properly I think, adversely to the plaintiff's contentions."

The Appellate Court held a similar view stating:

"We are convinced that the plaintiff was afforded a fair trial completely free of any prejudicial error and that substantial evidence supports the jury verdict."

STATEMENT OF FACTS

The Statement of Facts in petitioner's brief is inaccurate in most respects. A proper statement of the facts of the case can be found in the Opinion of the United States Court of Appeals for the Eighth Circuit which is included in the petition as Appendix "A".

REASONS THE WRIT SHOULD BE DENIED

I.

PETITIONER'S FAILURE TO OBJECT TO THE COURT'S CHARGE PRECLUDES A REVIEW OF THE LAW

The petition discusses at length the law said to be applicable to this case and purported legal errors committed by the Trial Judge. However, because this was a jury case, any legal issues must be framed with reference to the Court's charge to the jury. The Trial Court properly charged the jury with respect to the very acts of negligence to which petitioner alludes in her discussion of the law. For the convenience of the Court an extract from the Trial Court's charge is included as Appendix "A".

More important and decisive of this issue is the fact that no objection was made by counsel for petitioner to the pertinent portions of the Court's charge nor were there any objections with respect to a purported deficiency in the charge. The provisions of Rule 51 of the

Federal Rules of Civil Procedure, as well as the cases interpreting the rule, make it abundantly clear that failure to object to the charge in the Trial Court precludes a party from later attempting to set aside a jury verdict as being contrary to the law.[1] Rather clearly, there is no basis for a review of the law in this Court.

II

FAILURE OF PETITIONER TO MOVE THE TRIAL COURT FOR A DIRECTED VERDICT PRECLUDES A REVIEW OF THE FACTS

Plaintiff's counsel, a seasoned trial lawyer, was offered an opportunity by the District Judge to move for a directed verdict at the close of the evidence. No motion was made. The cases are legion in support of the proposition that a party failing to request a directed verdict may not raise the question of the sufficiency of the evidence to sustain the verdict.[2] Neither did the petitioner move for a judgment notwithstanding the verdict. There is, therefore, no basis for a review of the facts of this case.

CONCLUSION

None of the considerations set out in Rule 19 of the Supreme Court Rules are present in this case. All of the cases cited by petitioner in support of her contentions

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[1] *United States v. Atkinson*, 297 U.S. 157, 159, 56 S.Ct. 391, 392 (1936); *Fairmont Glass Works v. Cub Fork Cole Co.*, 287 U.S. 474, 486, 53 S.Ct. 252, 256 (1932).

[2] *Rotondo v. Isthmian Steamship Company*, 243 F.2d 581, 582 (2 Cir. 1957), certiorari denied 355 U.S. 834, 78 S.Ct. 53, 2 L.Ed.2d 45 (1957); *Parenzan v. Iino Kauin Kabushiki Kaisha*, 251 F.2d 928, (2 Cir. 1958), certiorari denied *International Terminal Operating Company, Inc. v. Iino Kauin Kaisha, Ltd.*, 356 U.S. 939, 78 S.Ct. 781, 2 L.Ed.2d 814 (1958); *Mahoney v. New York Central Railroad*, 234 F.2d 923, 924 (2 Cir. 1956); *Srybnik v. Epstein*, 230 F.2d 683, 686 (2 Cir. 1956); *Harriman v. Midland Steamship Line, Inc.*, 208 F.2d 564 (2 Cir. 1953); and cases cited at page 564, note 1; *Flint v. Youngstown Sheet & Tube Co.*, 143 F.2d 923, 924 (2 Cir. 1944); *Woodbridge v. DuPont*, 133 F.2d 904 (2 Cir. 1943); *Zimmerman v. Emmons*, 225 F.2d 97 (9 Cir. 1955).

involve non-jury matters.[3] There is no proper premise for a review by this Court of either the facts or the law upon which the jury rested its verdict in this case, and accordingly, certiorari should be denied.

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[3]Petitioner claims a conflict between this decision and the holding of the United States Fifth Circuit Court of Appeals in *Davis v. Parkhill-Goodloe Company*, 302 F.2d 489 (5th Cir., 1962). In *Davis*, however, the parties had expressly consented to a trial by the Court rather than the jury. Similarly, only non-jury cases are cited by petitioner in support of the contention that there is here a conflict with those cases protecting seamen as wards of the admiralty. See: *Harden v. Gordon*, 11 Fed. Cas. 480 (No. 6047) (C.C.Me. 1823); *Garrett v. Moore McCormack Company*, 317 U.S. 239 (1942); and *Brown v. Lull*, 4 Fed. Cas. 407 (No. 2018) (C.C.Mass. 1836). Finally, petitioner cites *Panama Mail S.S. Company v. Gargas*, 281 U.C. 670 (1930), as authority for petitioner's contention that this Court's ". . . review on certiorari, therefore, extends to the jury's finding of fact as well as to question (sic) of law." The case involved a suit for damages as a result of an alleged rape of a passenger. After a non-jury trial, the District Court failed to make findings of fact and the United States Supreme Court remanded the case in order that findings might be entered of record.

APPENDIX "A"

EXTRACT FROM THE CHARGE TO THE JURY BY THE TRIAL COURT

"Now, the plaintiff's theory and manner in which he has presented his case to you, it seems to the Court, presents three separate, and in another way indistinct or similar claims of negligence, departures from this standard of ordinary care.

First, the insufficient number of men assigned to do the particular task involved.

Second, the absence of the enforcement of the life jacket rule.

And third, the absence of any kind of practiced procedure to take care of an emergency when a man is overboard."

* * * * *

"Of course, as the operator of a vessel, this defendant had certain duties. It was his continuing duty, the owner of this towing company, as an employer, to use ordinary care under the circumstances in furnishing the plaintiff with a reasonably safe place in which to work, to use ordinary care under the circumstances to maintain and keep such place of work in a reasonably safe condition, to provide adequate life saving gear, and to promulgate and enforce regulations for its crews and for the rescue of seamen imperiled and to provide an adequate crew available for the discharge of the crewmen's responsibilities." (Transcript p. 483-485).